

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD.

Court of Appeals, District of Columbia

OCTOBER TERM, 1906.

No. 1694.

439

THE ALLEMANNIA FIRE INSURANCE COMPANY OF
PITTSBURG, STATE OF PENNSYLVANIA, A BODY COR-
PORATE, APPELLANT,

vs.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE,
A BODY CORPORATE UNDER THE LAWS OF THE
STATE OF MARYLAND, TO THE USE OF FRANCIS E. S.
WOLFE, RECEIVER.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED JUNE 30, 1906.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1906.

No. 1694.

ALLEMANNIA FIRE INSURANCE COMPANY OF
PITTSBURG, APPELLANT,

vs.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

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In the Court of Appeals of the District of Columbia.

No. 1694.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE
OF PENNSYLVANIA, a Body Corporate, Appellant,

vs.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate Under the Laws of the State of Maryland, to the Use of
FRANCIS E. S. WOLFE, Receiver.

a Supreme Court of the District of Columbia.

At Law. No. 47490.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate Under the Laws of the State of Maryland, to the Use of
FRANCIS E. S. WOLFE, Receiver, Plaintiff,

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE
OF PENNSYLVANIA, a Body Corporate, Defendant.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

Be it Remembered, That in the Supreme Court of the District of Columbia, at the city of Washington in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

1 *Declaration.*

Filed January 31, 1905.

In the Supreme Court of the District of Columbia.

At Law. No. 47490.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate Under the Laws of the State of Maryland, to the Use of
FRANCIS E. S. WOLFE, Receiver, Plaintiff,

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE
OF PENNSYLVANIA, a Body Corporate, Defendant.

The plaintiff sues the defendant, a foreign corporation doing business in the District of Columbia and having an agent therein con-

ducting its business, for money payable by the defendant to the plaintiff, for that, whereas, the plaintiff and the defendant, being each engaged in the business of insuring property against loss and damage by fire, said defendant issued and delivered to plaintiff its open policy of reinsurance, on to wit: the 8th day of June, A. D. 1895, in the words and figures following, to wit:

"Reinsurance Compact.

The Allemannia Fire Insurance Company of Pittsburg, Pa., With the Firemen's Insurance Company of Baltimore, Maryland.

2 By this compact of reinsurance The Allemannia Fire Insurance Company of Pittsburg, Pa., under the terms, conditions and stipulations hereinafter mentioned, hereby agrees to reinsure the Firemen's Insurance Company of Baltimore, Maryland, under its policies, renewals, entries, or certificates (herein termed contracts) in such amounts, for such periods of time, and at such rates of premium, as shall be entered in the book hereto attached, and duly reported, as hereinafter provided, by *The Allemannia Fire Insurance Company of Pittsburg, Pa. it Being Understood and Mutually Agreed* that each entry or certificate under this compact shall be made, issued and subject to and governed by the following terms, Conditions, and Stipulations:

Prohibitions, Lines and Limits.

1. Entries under this compact shall not be made to reinsure any portion of any contract covering risks prohibited in the list of *prohibited risks*, lines and limits furnished said Firemen's Insurance Company of Baltimore, Maryland, by this Company, and entries covering any risk or class of risks limited, shall not be binding for a sum in excess of the limits therein named, and entries shall not be binding for a sum exceeding the line or amount retained and carried by the said reinsured Company at its own risk, without other reinsurance, under its contracts covering property, in or on the same building or risk, in or on which the contracts so reinsured may cover, and in or on *others next adjacent thereto or connected therewith.*

3 2. It being further understood, that when by cancellations of contracts, at request of the assured, or reinsured or by transfer to cover in another location, or by expiration of contracts, whereby the said reinsured Company may be left with a line of amount pending at its own risk of less than the amount reinsured, or without any contract so pending excepting that which may be reinsured *such entries shall not be invalidated thereby.*

Ad-Interim Entries.

3. *Ad-interim* or covering entries under this compact may be made to reinsure and cover such excess lines or risks, not prohibited

and not to exceed the limits above referred to, as said reinsured Company may accept and insure or reinsure under its contracts.

4. Provided that on the day of such covering entry the said, Firemen's Insurance Company as aforesaid of said reinsured Company shall mail to the said Allemannia Fire Insurance Company at Pittsburg, Pa., an advice or covering report of the number, amount and date of such entry, and state therein the name of reinsured, location, kind or class or risk covered, and the amount it may then have pending thereon.

5. The intention herein being, that this Company shall protect the said reinsured Company, in the manner herein provided, upon such excess lines, from the date they are covered under the contracts of said reinsured Company, until full reports of the same, may by it, be received, and such entries being fully reported to this
4 Company as hereinafter provided, and in no event shall any *ad-interim* entry remain open or be binding upon this Company for a longer period than fifteen days from the date thereof.

Reinsurance Reports.

6. Each entry under this compact, and each cancellation, closing notice, endorsement or change that may refer to or change the ownership, location, or premium of the contract or risk hereunder reinsured, of which the said reinsured Company may have received notice at its office at, Baltimore, Maryland, shall be promptly reported to this Company upon blanks provided for that purpose, and each of such reports shall contain a copy of the contract hereunder reinsured, and of the endorsements or changes herein referred to, and the amount, rate, premium, term and expiration of such contracts, or of the reports of same made to said reinsured Company by the parties issuing or making the same.

7. Full and regular reports as above, shall also be made to replace each advice or covering report and complete each *ad-interim* entry that may have been made under this Compact, within five days after said reinsured Company shall have received at its office at Baltimore, Maryland, a full report of the contract reinsured *ad-interim*, and in no event shall such full and regular reports be delayed beyond a period of fifteen days from the date of such *ad-interim* entry, otherwise, the same shall be deemed to have been terminated or rendered void; and all of the reports above referred to shall be lodged
5 or filed with this Company and made a part of the entry to which they refer or pertain.

8. Each entry under this Compact shall be binding, commence, or take effect at 12 o'clock noon, of the day on which the reports herein referred to are mailed, addressed to the Allemannia Fire Insurance Company, at Pittsburg, Pa., and duly postmarked at the Post-office in the City of Baltimore, Maryland.

Cancellation of Entries.

9. This Company may decline any entry under this Compact, or cancel or terminate any entry by notifying the within named Fire-

men's Insurance Company, of said reinsured Company of its desire so to do, and refunding or tendering a pro-rata proportion of the reinsurance premium paid therefor, in which case the said reinsured Company shall be allowed ten days from the date of such notice within which to complete such cancellation, and the said reinsured Company may cancel and terminate any entry by allowing this Company the customary short rate proportion of the reinsurance premium thereon. It being understood that when any contract of said reinsured Company, hereunder reinsured, is cancelled at pro-rata rates, then this Company will refund at pro-rata proportion of the reinsurance premium received upon the entry reinsuring the same, also that a ratable proportion of any commission or other allowance made upon any reinsurance premium shall be deducted from the amount of unearned or returned premium, and the net balance only be returnable to said reinsured Company.

Losses and Loss Expenses.

10. Upon receiving notice of any loss or claim under any contract hereunder reinsured the said reinsured Company shall promptly advise the said Allemannia Fire Insurance Company, at Pittsburg, Pa. of the same, and of the date and probable amount of loss or damage, and after said reinsured Company shall have adjusted, accepted proofs of, or paid such loss or damage, it shall forward to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., a proof of its loss and claim against this Company, upon blanks furnished for that purpose, by said Firemen's Insurance Company, together with a copy of the original proofs and claim under its contract reinsured, and a copy of the original receipt taken upon the payment of such loss; and upon request, shall exhibit and permit copies to be made of all other papers connected therewith, which may be in its possession.

11. Each entry under this Compact, unless otherwise provided in this Compact, shall be subject to the same conditions stipulations, risks, and valuation as may be assumed by the said reinsured Company under its original contracts hereunder reinsured, and losses, if any, shall be payable pro-rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured Company under its contracts hereunder reinsured, and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured Company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts or any part thereof.

12. This Company shall reimburse the said reinsured Company for a ratable proportion of all actual expenses, legal and otherwise, incurred by said reinsured Company in adjusting, resisting or investigating any claim for loss under its contracts hereunder reinsured, or allowed by it therefor upon receiving a statement or account of said expenses.

Accounts and Allowances.

13. The said Officers of the said reinsured Company shall render to the said Allemannia Fire Insurance Company at Pittsburg, Pa. not later than the fifteenth day of each calendar month, a statement of all entries, or certificates of reinsurance made or issued under this Compact during the immediately preceding month, and shall accompany the same with an account current exhibiting the amount of reinsurance premiums as shown by said statement, and a remittance by check to order of said Allemannia Fire Insurance Company, to cover the amount of same, after deducting therefrom, the amount of cancelled or returned reinsurance premiums reported during the same month, and from the balance thus obtained 30% and 10% contingent per centum to cover commissions and all expenses excepting loss expenses.

Termination of Contract.

14. This compact of reinsurance may be discontinued and terminated by either Company herein named, upon its giving
8 thirty days' notice in writing to the other, and in the event of such discontinuance and termination of this Compact, all risks previously reinsured and accepted hereunder, shall remain in full force and effect until the expiration or cancellation of the original contracts, reinsured, unless otherwise mutually agreed.

Ad-Interim Renewals.

15. It is hereby understood and agreed that whenever contracts of the Firemen's Insurance Company, reinsured by any single policy, or by entries under this compact, or any policy of this Company, is continued beyond expiration or termination by said reinsured Company, either by a renewal, agreement, or a new policy, or entry upon the same risk for the same amount as the expired or terminated contract so reinsured, such single policies or entries under said Compact or policies shall be considered as continuing and binding, *ad-interim*, for a period of not exceeding twenty days from the date of their expiration, in the same proportion and manner as they originally applied to such reinsured contracts. Provided that said reinsured Company shall mail to the said Allemannia Fire Insurance Company, at Pittsburg, Pa., as provided in said compact, a full report of the entry made to continue the reinsurance of such contracts as may be renewed or rewritten within five days after it shall receive notice of a renewal or continuation of such contracts, at its office at Pittsburg, Pa., and within twenty days after the expiration of said reinsurance policies or entries so continued, otherwise such *ad-interim* reassurances shall be void and of no effect.

9 *In Witness Whereof*, this Company has caused these presents to be signed by its President and Secretary, in the City of Pittsburg, State of Pennsylvania on this 8th day of June in the year eighteen hundred and ninety-five.

JOS. ABEL, *President.*

G. W. HAMMER, *Secretary."*

And the plaintiff avers that it had severally insured against direct loss by fire, certain risks in certain amounts under certain policies issued by it, and the defendant, having been duly paid by the plaintiff the several premiums therefor, did in and by its said policy of reinsurance, reinsure said plaintiff a certain portion of said risks respectively; that the direct losses by fire under said risks so insured by plaintiff and reinsured as aforesaid by defendant, as finally ascertained, adjusted and determined, amount in the aggregate to the sum of, to wit: \$56,312.56, for which the plaintiff was and is liable as aforesaid; and for the sum of, to wit: \$22,613.24 of this amount said defendant is liable to the plaintiff under said contract of reinsurance by it as aforesaid, on said several risks so reinsured by it as aforesaid in full force and effect at the time of loss respectively.

And plaintiff further avers that it fully complied with all the terms of said contract of reinsurance on its part and did and performed all the acts and obligations which it was obligated to do and perform in order to entitle it to the performance of said contract on

10 the part of the defendant, and to the payment by the defendant to the plaintiff of the amount of loss as aforesaid under the said several risks so reinsured by it as aforesaid.

And plaintiff files herewith, as part hereof, and as though fully set forth herein, its particulars of demand, giving in detail the number of each policy issued by it, the party insured, the property insured, the amount insured, the number of each entry duly made and reported and giving all the information as and required by said contract of reinsurance, the amount of loss determined and adjusted under each policy and the respective amounts for which said defendant is liable to the plaintiff, under each entry of reinsurance aforesaid, of each and all of which said defendant was duly notified, informed and advised; but said defendant, notwithstanding its undertaking and promise as aforesaid and in violation thereof, although requested, has refused to pay its share of the losses aforesaid.

And the plaintiff further avers that by reason of the heavy losses sustained by it in the great conflagration in the City of Baltimore, State of Maryland, in the month of February, 1904, under its outstanding policies, and for which said losses it is liable, it became insolvent and unable to pay said losses and will be unable to pay the same unless it can collect the amount due it by the defendant as aforesaid and other corporate fire insurance companies with which it had contracts of reinsurance; and that by decree passed by the Circuit Court of Baltimore City on the 16th day of February, A. D. 1904, at the suit of Lloyd Wilkinson, Insurance Commissioner, *et al.*,

11 in case No. A 3299, said Francis E. S. Wolfe was appointed Receiver of the plaintiff and authorized to take possession of all its assets and to collect the outstanding debts due it.

And the plaintiff further sues the defendant for work and labor done by the plaintiff for the defendant at its request: for money paid by plaintiff for use of defendant at its request; and for money found due by the defendant to the plaintiff on accounts stated between them.

And the plaintiff claims \$22,613.24, with interest from May 1,

1904, until paid, according to the particulars of demand hereto annexed; and the costs of suit.

WM. F. MATTINGLY & SON,
Attorney- for Plaintiff.

Verdict was for int. from *May 4 '04.* F. W. S.

The defendant is to plead hereto on or before the twentieth day, exclusive of Sundays and legal holidays, occurring after the day of service hereof; otherwise judgment.

WM. F. MATTINGLY,
Attorney for Plaintiff.

12 Allemania Fire Insurance Company of Pittsburgh, Pa., to Firemen's Insurance Co. of Baltimore, to E. S. Wolfe, Receiver.

For amount of Loss under the following entries of the Allemania Fire Insurance Co., Reinsuring the following Policies of the Firemen's Insurance Company of Baltimore as per Claims filed:

Firemen's.	Am't loss.	Allemania proportion.
#166668. O. B. Zantzinger \$1500 H. H. Furniture Pikesville Md.....	\$333.33	
Allemania entry #5499, Reinsures.....		\$111.11
165546. W. J. Dickey & Son, \$10,000. Building 16 Light St. Balto. Md.....	10,000.00	
Allemania entry #5234, Reinsures.....		5000.00
474452. Caroline Rennert, \$1500 Building 13-15 E. Fayette —, Balto. Md.....	1,500.00	
Allemania entry #5465, Reinsures.....		1500.00
165513. Md. Nat'l Bank. \$5000 Building—Hopkins Pl. & Lombard St. Balto. Md.....	169.70	
Allemania entry #5256, Reinsures.....		42.42
163983. L. & M. Kiefer, \$5000 Building 407 E. Fayette St. Balto. Md.....	4,161.00	
Allemania entry #4742, Reinsures.....		2080.50
156630. Thos. Deford & . \$4000 Building 40. 42 S. Calvert St. Balto. Md.....	4,000.00	
Allemania entry #4856, Reinsures.....		2000.00
158179. Builders' Exchange Co. \$10000. Building—Charles & Lexington Sts. Balto., Md.....	21.73	
Allemania entry #3218, Reinsures.....		10.86
150163. E. F. Abell, \$5000 Building 11 E. Lombard —, Balto. Md.....	5,000.00	
Allemania entry #5295, Reinsures.....		1500.00
13		
165593. E. R. West, \$7000 Furniture &c. Fred'k Road Balto. Md.....	87.00	
Allemania entry #5243, Reinsures.....		21.75
158125. Nat'l Union Ins. Co. \$6000 Building—912 Penna. Ave. N. W. Washington, D. C.....	21.00	
Allemania entry #3193, Reinsures.....		7.00
157688. M. Restivo, \$2000 Saloon & fur. Back River Balto. Co., Md.....	1018.80	
Allemania entry #5184, Reinsures.....		339.60
163406. Sperry Jones & Co., \$30,000. Buildings S. E. cor. Fayette & Calvert & 7 N. Calvert St. Balto. Md. V—Cook Rec.	30000.00	
Allemania entries #4566 and 4571 Reinsures (\$5000 each).		10,000.00
		<u>\$22,613.24</u>

Demurrer.

Filed February 27, 1905.

In the Supreme Court of the District of Columbia.

No. 47490. Law.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, to the Use, &c.,
vs.
ALLEMANNA FIRE INSURANCE COMPANY OF PITTSBURGH.

The defendant says that the declaration filed herein is bad in substance.

ANDREW Y. BRADLEY,
Attorney for Defendant.

14 NOTE.—One of the matters of law to be argued in support of this demurrer is that the declaration does not show a sufficient performance on the part of the plaintiff of the contract sued upon, as to entitle it to maintain this action.

Supreme Court of the District of Columbia.

Friday, June 2, 1905.

Session resumed pursuant to adjournment, Mr. Justice Barnard, presiding.

At Law. No. 47490.

THE FIREMEN'S INS. CO. OF BALTIMORE, Pl'ff,
v.
THE ALLEMANNA FIRE INS. CO. OF PITTSBURG, Def't.

Upon hearing the demurrer of the defendant to the declaration, it is considered that said demurrer be, and the same hereby is overruled; with leave to the defendant to plead within fifteen days, as it may be advised.

15

Opinion.

Filed June 2, 1905.

In the Supreme Court of the District of Columbia.

47490. Law.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, to the Use of
FRANCIS E. F. WOLFE, Receiver, Plaintiff,

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, De-
fendant.

In this case a declaration is filed by the plaintiff against the defendant, based upon a contract of reinsurance of property insured by the plaintiff Company, and which was destroyed by the conflagration in Baltimore, in February, 1904.

A copy of the contract is set out in the declaration, wherein it is designated, "Reinsurance Compact." The plaintiff had originally insured the property which was destroyed, and after the adjustment its losses were calculated to be Fifty-six Thousand, Three Hundred and Twelve Dollars, and Fifty-six Cents, (\$56,312.56) and the amount of reinsurance for which the defendant is sued, is Twenty-two Thousand, Six Hundred and Thirteen Dollars, and Twenty-four cents (\$22,613.24).

There were twelve separate policies of the plaintiff Company, insuring as many separate risks. A certain proportion of each risk, as described in said policies, was assumed by the defendant under its reinsurance compact.

16 The declaration further avers that the plaintiff Company became insolvent by reason of the heavy losses sustained by it in the said conflagration; and that by decree of the Circuit Court of Baltimore City, said Receiver was appointed and authorized to take possession of all its assets and collect its outstanding debts.

The declaration also contains the common counts for work and labor done, and money paid, and for money found due.

The eleventh clause of the compact of reinsurance is as follows:

"Each entry under this Compact, unless otherwise provided in this Compact, shall be subject to the same conditions, stipulations, risks and valuation as may be assumed by the said reinsured Company under its *original* contracts hereunder *reinsured*, and losses, if any, shall be payable pro-rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured Company under its contracts hereunder reinsured, and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured Company under its original contracts hereunder reinsured after deducting therefrom any and all liability of other reinsurers of said contracts, or any part thereof."

To this declaration the defendant has filed a demurrer, and states that one of the matters of law to be argued in support of it is, that the declaration does not show a sufficient performance of said contract, on the part of the plaintiff to entitle it to maintain this action.

It does not appear from the declaration that the plaintiff has paid any part of the losses incurred under the policies described. The defendant claims that such payment is necessary before the plaintiff can recover on the contract or reinsurance, and bases such claim upon the language of said paragraph eleven, which says, "losses, if any, shall be payable pro-rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured Company under its contracts hereunder reinsured, and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured Company under its original contracts," &c.

It is claimed by counsel for the defendant that these words must be construed to mean that before liability attaches upon the part of the defendant, the plaintiff must have actually paid the amount which it contracted to pay upon the said several policies of insurance; and such being a condition precedent, that the words, "in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid," &c., preclude the idea that the insolvency of the plaintiff will excuse such actual payment in order to fasten liability upon the company.

What is a condition precedent? The authorities define it as follows:

"A condition which calls for the performance of some act, or the happening of some event, after the terms of the contract have been agreed upon, before the contract shall take effect." (8 Cyc., 558.)

Again, A "condition which must be performed before the agreement of the parties becomes a valid and binding contract." (7 Am. & Eng. Enc. (2nd Ed.) 118.)

Again it is said that where a condition precedent exists, the contract may be made in due form, but it does not become operative as a contract until the condition specified is performed.

In the usual contract of reinsurance, the reinsuring company agrees with the reinsured company to share the responsibility of the risk of loss by fire, which the reinsured company has become bound to pay by its contract with the owner of the property. This contract of reinsurance is made for a consideration which is paid when the contract is entered into, and it becomes a valid contract from its date. If no fire occurs, nothing will ever be paid by the reinsuring company. If a fire occurs, and the company making the original contract of insurance adjusts the loss, then to the extent of such loss, or the proportionate part thereof assumed by the reinsuring company, the company writing the first policy has its right of action, and the reinsuring company will be obliged to pay.

It is the contracts of insurance that are re-insured by the express language of the compact.

Counsel for the defendant admit that the general rule is that the

insolvency of the reinsured company will not excuse the reinsuring company from paying its obligations; but his argument is that in the present case, the special words contained in paragraph eleven, must necessarily mean that no obligation arises until after actual payment is made by the plaintiff.

A number of authorities have been cited, which hold that the words in said paragraph which provide for the payment of the pro-rata part, "in the same manner and upon the same terms
19 "and conditions as paid by the said reinsured company," &c. do not require that the reinsured company should first have paid the losses under its original contract.

It is a cardinal principle of the law of reinsurance that the reinsurer is not liable on his contract for more than the amount of the original insurance; and where the contract of reinsurance is for a certain proportion of the original insurance, these words are construed to apply, not to the question of liability, but only to the amount which is to be paid; and no other construction seems to give force and effect to the whole contract; so that if these were the only words in this contract by which the defendant would claim to be excused from payment by reason of the insolvency of the plaintiff, and its failure to have paid its own obligations, the construction contended for by defendant's counsel would have to be considered against the clear weight of authority, and the demurrer would have to be overruled.

Counsel insists, however, that the words, "and in no event shall this Company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured, or reinsured by the said reinsured company, under its original contracts," &c., mean, and must necessarily be construed and held to mean, that before liability attaches, the loss by fire must have been incurred, and actually paid; and such it seems to me must be the logic of the case, if actual payment is a condition precedent.

The fallacy of such a construction, however, will appear
20 by the very statement of it. If no liability is to be incurred by the defendant by virtue of its contract, until after a fire has occurred, and the loss has been paid by the plaintiff, what consideration will the plaintiff receive for its premiums paid to the defendant? And what inducement will there be for a contract of reinsurance. In all cases where no fires occur during the life of the first policies, the company writing them would then be paying for contracts of reinsurance, that never took effect.

If we read the last words of the clause, number eleven, we see at once what the parties referred to, by the use of these limiting words, namely, a method of determining the actual amount of the defendant's liability under its said contract, and not the time when the liability should first attach, because these words, if applied to the question of amount only, are given ample meaning, and such as will be in consonance with all the other words of the contract.

They were intended to mean, and do mean, as I think, when read in connection with the whole contract, that in no event should the defendant be required to pay on its contract more than its ratable proportion of the actual liability of the plaintiff, "after deducting

therefrom any and all liability of other reinsurers of said contracts, or any part thereof." That means simply this, that if the plaintiff's original contract was for Three Thousand Dollars, (\$3,000.) and it had reinsured One Thousand Dollars (\$1,000.) with the defendant, and One Thousand Dollars, (\$1,000.) with another company, and afterwards a fire had occurred, and the loss had
 21 been adjusted and determined to be One Thousand, Five Hundred Dollars, (\$1,500.) the defendant could be held liable to pay only Five Hundred Dollars (\$500.) of that loss.

Of course it is contemplated in the making of a contract, such as is described in this declaration, that payment is to be made by the company reinsured, and the use of the words, "actually paid," may readily be attributed to that fact; and when the contract was prepared, the possibility of insolvency of the plaintiff may not have been considered; but as the contract must be given a rational meaning, if possible, and as it must be construed most strictly against the defendant, the party making the same, I think it must be held that these words only apply to the amount for which the plaintiff is to be actually liable to pay, after making the deductions named; and that the amount of such obligations or liability, is what the defendant intended to indemnify him against by its contract of reinsurance.

The defendant received a consideration, based upon the tables, supposed from experience to be profitable for the party making such a contract of indemnity, and fair to the party reinsured; and I think it was never intended that before any liability whatever, attached, the fire should have destroyed the property insured, and the loss should have been actually paid by the plaintiff. I think the reinsurance contract is an available asset of the insolvent company which has providently invested its money in such contract. I will therefore overrule the demurrer to this declaration, with leave to the defendant to plead thereto within ten days.

JOB BARNARD, *Justice.*

22

Pleas.

Filed June 26, 1905.

In the Supreme Court of the District of Columbia.

No. 47490. At Law.

THE FIREMEN'S INSURANCE COMPANY

vs.

THE ALLEMANNA FIRE INSURANCE COMPANY.

The defendant for plea to the declaration filed herein, says that it did not undertake and promise in manner and form as in said declaration alleged.

2. And for a further plea, the defendant says that the plaintiff is not liable to Vernon Cook, receiver of Sperry Jones and Company, as set out in the particulars of demand annexed to the declaration filed herein.

ANDREW Y. BRADLEY,
Attorney for Defendant.

Joinder in Issue.

Filed June 27, 1905.

In the Supreme Court of the District of Columbia, the 27th Day of June, 1905.

No. 47490. At Law.

Between—

THE FIREMEN'S INS. Co., Plaintiff,
and
THE ALLEMANNIA FIRE INS. Co., Defendant.

23 The Plaintiff joins issue upon the defendant's pleas.

WM. F. MATTINGLY,
Attorney for Plaintiff.

Memorandum.

April 25, 1906.—Verdict for plaintiff for Twelve thousand six hundred and thirteen dollars and twenty-four cents (\$12,613.24) with interest from May 4, 1904.

Supreme Court of the District of Columbia.

WEDNESDAY, May 2, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

* * * * *

At Law. No. 47490.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate Under the Laws of the State of Maryland, to the Use of FRANCIS E. S. WOLFE, Receiver, Pl'tff,

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE OF PENNSYLVANIA, a Body Corporate, Def't.

The time within which to move for a new trial having expired, judgment on verdict is ordered.

24 Therefore it is considered that the plaintiff recover against the defendant the sum of Twelve thousand, six hundred and thirteen 24/100 (\$12,613.24), with interest thereon at the rate of six (6) per cent. per annum from the 4th day of May, 1904 until paid, being the money payable by it to the plaintiff, by reason of the premises, together with its costs of suit to be taxed by the Clerk, and have execution thereof.

Supreme Court of the District of Columbia.

FRIDAY, *May* 11, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright, presiding.

At Law. No. 47490.

THE FIREMEN'S INSURANCE COMPANY OF BALTIMORE, a Body Corporate Under the Laws of the State of Maryland, to the Use of FRANCIS E. S. WOLFE, Receiver, Pl't'f.

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY OF PITTSBURG, STATE OF PENNSYLVANIA, a Body Corporate, Def't.

Now comes here as well the plaintiff by its Attorney Mr. William F. Mattingly, as the defendant by its Attorney Mr. Andrew Y. Bradley; whereupon the Attorney for the defendant in open court notes an appeal to the Court of Appeals, and moves the Court to fix the amount of bond on said appeal, which motion is granted, and the penalty of the bond to operate as a supersedeas is
25 fixed at twenty thousand dollars (\$20,000).

Memorandum.

May 21, 1906.—Appeal Bond Filed.

Supreme Court of the District of Columbia.

WEDNESDAY, *June* 13, 1906.

Session resumed pursuant to adjournment, Mr. Justice Wright presiding.

* * * * *

At Law. No. 47490.

THE FIREMEN'S INSURANCE COMPANY, Pl't'f,

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY, Def't.

Now comes the defendant by its Attorneys and pray- the Court to sign, seal and make part of the record, its bill of exceptions taken during the trial of this cause, now for then, which is accordingly done.

26

Bill of Exceptions.

Filed June 13, 1906.

In the Supreme Court of the District of Columbia.

No. 47490. At Law.

THE FIREMEN'S INSURANCE COMPANY

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY.

Be it remembered that the above entitled cause came on to be tried before Mr. Justice Wright and a jury, on the 25th day of April A. D. 1906; Messrs. William F. Mattingly & Son and T. Wallis Blackistone appearing on behalf of the plaintiff, and Messrs. Andrew Y. Bradley and Charles H. Bradley on behalf of the defendant.

And thereupon the plaintiff, to maintain the issues on its part joined, introduced in evidence the insurance compact herein sued upon, the only section of which in regard to the construction of which there is any question raised by the pleadings and record herein, is as follows:

11. Each entry under this compact, unless otherwise provided in this compact, shall be subject to the same conditions, stipulations, risks, and valuation as may be assumed by the said reinsured company under its original contracts hereunder reinsured, and losses, if any, shall be payable pro rata with, in the same manner, and upon the same terms and conditions as paid by the said reinsured company

under its contracts hereinunder reinsured, and in no event
27 shall this company be liable for an amount in excess of a ratable proportion of the sum actually paid to the assured or reinsured by the said reinsured company under its original contracts hereunder reinsured, after deducting therefrom any and all liability of other reinsurers of said contracts, or of any part thereof."

And thereupon the plaintiff introduced further evidence sufficient to entitle it, upon the questions of fact, to a verdict for the sum of \$12,613.24 with interest from May 4th, 1904. The plaintiff also introduced evidence by which it established the fact that it had become insolvent by reason of the losses sustained by it incident to the Baltimore fire of 1904, and that a receiver had been appointed for it by the courts of Maryland, and that said receiver had paid to its creditors after this suit was brought, three dividends, namely, one of thirty, one of thirteen, and one of twelve per cent., aggregating fifty-five per cent.

And thereupon the plaintiff rested.

And thereupon the defendant, by its counsel, moved the Court to instruct the jury to return a verdict for the defendant, upon the ground that there was a variance between the allegations of the declaration and the evidence in regard to the insolvency of the plaintiff.

And thereupon the Court overruled the said motion of the defend-

ant, to which said action the said defendant, The Allemannia Fire Insurance Company, by its counsel, then and there duly excepted, which said exception was duly allowed.

28 . And thereupon the defendant, by its counsel, without offering any evidence, prayed the Court to instruct the jury as follows:—

“No. 2. The jury are instructed that proof of mere liability on the part of the plaintiff under the original contracts or policies, involved in this suit, is not sufficient to entitle it to a verdict against the defendant; and the jury are therefore further instructed, that they must return a verdict in favor of the defendant, unless they shall find from the evidence that the plaintiff has actually paid the whole or some part of one or more of the claims against it enumerated in the schedule annexed to the contract of reinsurance here sued upon.”

“No. 3. The jury are instructed that if they find for the plaintiff, their verdict must not be for an amount in excess of a ratable proportion of the various sums actually paid by it to its policy holders under the original contracts or policies enumerated in the schedule attached to the declaration filed herein.”

Which instructions were rejected by the court, and to the refusal of the court to grant the same the defendant then and there duly excepted, and the said exceptions were thereupon noted on the minutes of the court and duly allowed.

And thereupon the jury, under the instruction of the court, returned a verdict in favor of the plaintiff for the sum of \$12,613.24 with interest from May 4th, 1904.

29 All the foregoing exceptions were duly and separately taken before the jury was instructed to return its verdict as aforesaid, and were duly noted by the court on its minutes at the time the same were severally taken, and were severally allowed by the court, and reference is hereby made to the same as though they were now severally and separately stated, and at the request of counsel for the defendant this bill of exceptions is signed and sealed, and made a part of the record in this case, now for then.

Witness my hand and seal this 13 day of June, A. D. 1906.

DAN THEW WRIGHT, *Justice*. [SEAL.]

O. K.

W. F. MATTINGLY,
Pl'ff's Att'y.

June 13, 1906.

Order for Preparation of Record.

Filed June 13, 1906.

In the Supreme Court of the District of Columbia.

The 13th day of June, 1906.

At Law. No. 47490.

THE FIREMEN'S INSURANCE COMPANY

vs.

THE ALLEMANNIA FIRE INSURANCE COMPANY.

The Clerk of said Court will please prepare a transcript of record in the above-entitled cause and include therein the following:—

30

Declaration,
Demurrer,
Order overruling demurrer,
Opinion of the Court,
Pleas,
Joinder of Issue,
Verdict and Judgment,
Memorandum of Appeal and Appeal Bond,
Bill of Exceptions.

CHARLES H. BRADLEY,
ANDREW Y. BRADLEY,
Attorneys for Defendant.

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Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia, ss:*

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 30, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 47,490 At Law, wherein The Firemen's Insurance Company of Baltimore, &c., is Plaintiff, and The Allemannia Fire Insurance Company of Pittsburg &c., is Defendant, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the city of Washington in said District, this 22nd day of June, A. D., 1906.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 1694. The Allemannia Fire Insurance Company of Pittsburg, State of Pennsylvania, a body corporate, appellant, *vs.* The Firemen's Insurance Company of Baltimore, a Body Corporate Under the Laws of the State of Maryland, to the Use of Francis E. S. Wolfe, receiver. Court of Appeals, District of Columbia. Filed Jun. 30, 1906. Henry W. Hodges, clerk.

3—1694A